

¹ R.H. Trans. at 4. Also see respondent's submission letter to Judge Foerschler stipulating that claimant was entitled to receive the maximum rate of disability compensation of \$449 per week, which is the maximum rate for injuries sustained during the period from July 1, 2004, through June 30, 2005.

ISSUES

This is a claim for bilateral upper extremity injuries. In the June 27, 2007, Award, Judge Foerschler adopted the functional impairment opinion of Dr. Lanny W. Harris, the court-ordered evaluator, and awarded claimant permanent disability benefits for a 20 percent functional impairment to the right upper extremity and a 20 percent functional impairment to the left upper extremity.

Claimant contends Judge Foerschler erred. Claimant argues the Board should adopt the functional impairment opinion of his medical expert, Dr. James A. Stuckmeyer, and, therefore, find claimant has sustained a 30 percent functional impairment to each upper extremity. Claimant notes that, pursuant to *Casco*², the presumption of permanent total disability has been overcome and that he is entitled to benefits for two separate injuries under the schedules of K.S.A. 44-510d.

Respondent argues Dr. Harris' opinion is more credible than Dr. Stuckmeyer's opinion as Dr. Harris' examination is the more recent and Dr. Harris is the more unbiased of the two physicians as he was appointed by Judge Foerschler to evaluate claimant.

The nature and extent of claimant's injury and impairment is the only issue before the Board on this appeal.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record and considering the parties' arguments, the Board finds and concludes the Award should be modified.

Due to the nature of the work claimant performed for respondent, which manufactured batteries, claimant injured both upper extremities. The parties stipulated claimant sustained personal injury by accident arising out of and in the course of his employment with respondent.

Claimant's upper extremity symptoms began in the 1990s. Claimant eventually began treating with Dr. Brad W. Storm, who diagnosed both bilateral carpal tunnel syndrome and bilateral cubital tunnel syndrome. In March 2003, Dr. Storm operated on claimant's left arm and performed a left cubital tunnel release with anterior ulnar transposition and left carpal tunnel release. In June 2003, Dr. Storm performed the same procedures on claimant's right arm.

² *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, 154 P.3d 494 (2007).

Despite surgery, claimant's symptoms did not significantly improve. Nonetheless, he continued working for respondent until February 28, 2005, when respondent shut down his department.

The principal issue before the Board on this appeal is the extent of claimant's functional impairment rating for both upper extremities. There is no argument the recent *Casco*³ decision dictates that permanent disability benefits for bilateral upper extremity injuries are compensated as two separate injuries under the schedules of K.S.A. 44-510d. Moreover, there is no argument the evidence overcomes any presumption that claimant is permanently and totally disabled. Consequently, claimant's benefits for his bilateral upper extremity injuries are based upon the permanent functional impairment he has sustained as a result of these injuries.

The parties stipulated the medical reports of Dr. James A. Stuckmeyer and Dr. Lanny W. Harris were part of the evidentiary record. That is the only medical evidence in the record that addresses claimant's functional impairment.

At the request of claimant's former attorney, Mr. Steven J. Borel, Dr. Stuckmeyer examined claimant in early November 2003. The doctor, who is an orthopedic surgeon from Blue Springs, Missouri, concluded claimant developed both bilateral carpal tunnel syndrome with Guyon's canal entrapment of the ulnar nerve and bilateral cubital tunnel syndrome due to the repetitive work claimant performed for respondent. Dr. Stuckmeyer also noted claimant had degenerative changes in the carpal bones and an old scaphoid fracture in the right hand and a triquetral fracture in the left hand. Using the fourth edition of the *AMA Guides*⁴, the doctor determined claimant sustained a 30 percent impairment to each upper extremity. Dr. Stuckmeyer wrote, in pertinent part:

It is also the opinion of this examiner that as a direct result of the occupational injuries which Mr. Reed has sustained and utilizing The Guides to the Evaluation of Permanent Impairment, 4th Edition, Mr. Reed has suffered a 30% permanent partial impairment to the right upper extremity which is an 18 percent body as a whole impairment rating and a 30 percent permanent partial impairment to the left upper extremity which is a[n] 18 percent body as a whole impairment rating. Using the combined values chart I would rate Mr. Reed at 33 percent body as a whole impairment.⁵

³ *Id.*

⁴ American Medical Association, *Guides to the Evaluation of Permanent Impairment*.

⁵ Stuckmeyer Report at 5.

But it is unclear from Dr. Stuckmeyer's report whether he believed the degenerative changes and fractures in claimant's hands were either caused or aggravated by claimant's work, whether the impairment from those conditions was included in the impairment ratings he provided, or how he formulated his ratings.

On the other hand, Dr. Harris, whom the Administrative Law Judge selected to evaluate claimant, determined claimant sustained a 20 percent impairment to each upper extremity as measured by the fourth edition of the *AMA Guides*. Dr. Harris, who is a board-certified orthopedic surgeon from Olathe, Kansas, examined claimant in January 2004 and indicated that claimant's loss of motion in his left elbow and loss of motion in his wrists were not related to his work. Moreover, the doctor concluded the degenerative condition and fractures in claimant's hands were not related to his work. The doctor wrote, in part:

A rating was computed using the Guides to the Evaluation of Permanent Impairment, Fourth Edition, by the *American Medical Association*. A finding, which in my opinion most accurately reflected impairment, is that of the diminished grip strength in both upper extremities. I believe the majority of that is certainly secondary to the palmar tenderness. A slight loss of range of motion in the wrists, in my opinion, is related to his old fractures and degenerative joint disease.

Therefore, using Table 32 and Table 34, a strength loss index was computed. There was a strength loss index of 60% of the right upper extremity and strength loss index in the left upper extremity of 54%. Each of those percentages yielded a 20% permanent partial impairment of the right upper extremity and a 20% permanent partial impairment of the left upper extremity.⁶

But it is not clear from Dr. Harris' report if his rating only addresses the impairment relative to claimant's bilateral carpal tunnel syndrome and resulting surgeries or whether the ratings include the impairment, if any, that arises from the bilateral cubital tunnel syndrome.

The Board concludes claimant is entitled to receive disability benefits for the bilateral carpal tunnel syndrome and bilateral cubital tunnel syndrome that he developed. The Board is not persuaded that either doctor was more proficient than the other in determining functional impairment under the fourth edition of the *Guides*. Accordingly, the Board gives equal weight to the doctors' ratings and finds that claimant sustained a 25 percent impairment to the left upper extremity and a 25 percent impairment to the right upper extremity due to the work he performed for respondent. Hence, claimant is entitled to a 25 percent disability to his left upper extremity and a 25 percent disability to his right upper extremity under the schedules of K.S.A. 44-510d.

⁶ Harris Report at 5.

In conclusion, the June 27, 2007, Award should be modified to add Docket No. 1,013,855, change the date of accident to February 28, 2005, correct the compensation rate, and increase claimant's functional impairment and permanent disability ratings.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.⁷ Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

AWARD

WHEREFORE, the Board modifies the June 27, 2007, Award entered by Judge Foerschler.

Left Arm

Harold Reed is granted compensation from Delphi Automotive Systems Corporation for a February 28, 2005, accident and resulting disability. Mr. Reed is entitled to receive 52.50 weeks of permanent partial disability benefits at \$449 per week, or \$23,572.50, for a 25 percent permanent partial disability to the left arm, making a total award of \$23,572.50, which is all due and owing less any amounts previously paid.

Right Arm

Harold Reed is granted compensation from Delphi Automotive Systems Corporation for a February 28, 2005, accident and resulting disability. Mr. Reed is entitled to receive 52.50 weeks of permanent partial disability benefits at \$449 per week, or \$23,572.50, for a 25 percent permanent partial disability to the right arm, making a total award of \$23,572.50, which is all due and owing less any amounts previously paid.

Ms. Wilson's fee is subject to the claims or liens, if any, of attorneys Steven J. Borel and Paul T. Davis. Any fee disputes should be decided by the Judge.

The record does not contain a written fee agreement between claimant and attorney Steven J. Borel or between claimant and attorney Paul T. Davis. K.S.A. 44-536(b) requires the written contract between the employee and the attorney be filed with the Director for review and approval. Should Mr. Borel or Mr. Davis desire any fee in this matter, counsel must submit the fee agreements to the Judge for approval.

⁷ K.S.A. 2006 Supp. 44-555c(k).

The Board adopts the remaining orders set forth in the Award to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of October, 2007.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Stephanie J. Wilson, Attorney for Claimant
 Paul T. Davis, Attorney for Claimant
 Steven J. Borel, Former Attorney for Claimant
 Peter J. Chung , Attorney for Respondent
 Robert H. Foerschler, Administrative Law Judge